

**ASSEMBLY CONCURRENT
RESOLUTION No. 255**

STATE OF NEW JERSEY

217th LEGISLATURE

INTRODUCED NOVEMBER 30, 2017

Sponsored by:

Assemblyman JOHN F. MCKEON

District 27 (Essex and Morris)

Assemblyman TIM EUSTACE

District 38 (Bergen and Passaic)

Co-Sponsored by:

Assemblyman Wisniewski

SYNOPSIS

Invalidates certain DEP rules and regulations concerning septic system density standards in Highlands Water Protection and Planning Act Rules.

CURRENT VERSION OF TEXT

As introduced.



(Sponsorship Updated As Of: 1/9/2018)

1 **A CONCURRENT RESOLUTION** concerning legislative review of
 2 rules and regulations pursuant to Article V, Section IV,
 3 paragraph 6 of the Constitution of the State of New Jersey and
 4 invalidating the Department of Environmental Protection rule
 5 concerning septic system density standards in the Highlands
 6 Water Protection and Planning Act Rules.

7
 8 **WHEREAS**, Pursuant to Article V, Section IV, paragraph 6 of the
 9 Constitution of the State of New Jersey, the Legislature may review
 10 any rule or regulation adopted or proposed by an administrative
 11 agency to determine if it is consistent with the intent of the
 12 Legislature, and invalidate an adopted rule or regulation or prohibit
 13 the adoption of a proposed rule or regulation if it finds that the rule
 14 or regulation is not consistent with legislative intent; and

15 **WHEREAS**, Upon finding that a rule or regulation, either proposed or
 16 adopted, is not consistent with legislative intent, Article V, Section
 17 IV, paragraph 6 provides that the Legislature shall transmit its
 18 findings in the form of a concurrent resolution to the Governor and
 19 the head of the Executive Branch agency which promulgated, or
 20 plans to promulgate, the rule or regulation, and the agency shall
 21 have 30 days from the time the concurrent resolution is transmitted
 22 to amend or withdraw the rule or regulation; and

23 **WHEREAS**, If the agency does not amend or withdraw the existing or
 24 proposed rule or regulation, Article V, Section IV, paragraph 6
 25 provides that the Legislature may invalidate the existing rule or
 26 regulation or prohibit the adoption of the proposed rule or
 27 regulation, following a public hearing held by either House on the
 28 invalidation or prohibition, the placement of a transcript of the
 29 public hearing on the desks of the members of each House of the
 30 Legislature in open meeting followed by the passage of at least 20
 31 calendar days, and a vote of a majority of the authorized
 32 membership of each House in favor of a concurrent resolution
 33 invalidating or prohibiting the adoption of the rule or regulation;
 34 and

35 **WHEREAS**, On May 2, 2016, the Department of Environmental
 36 Protection (DEP) proposed for public comment in the New
 37 Jersey Register, at 48 N.J.R. 677(a), a rule proposal to revise the
 38 septic system density standards in the Highlands Water
 39 Protection and Planning Act Rules; and

40 **WHEREAS**, The “Highlands Water Protection and Planning Act”
 41 (“Highlands Act”), P.L.2004, c.120 (C.13:20-1 et al.), establishes
 42 a comprehensive, long-term approach to the protection and
 43 preservation of the drinking water and natural resources of the
 44 New Jersey Highlands Region, which is the source of the
 45 drinking water for more than half of the residents of New Jersey
 46 and contains other exceptional natural resources such as clean
 47 air, contiguous forest lands, wetlands, pristine watersheds, and
 48 habitat for fauna and flora, includes many sites of historic

1 significance, and provides abundant recreational opportunities
2 for the citizens of the State; and

3 **WHEREAS**, The Highlands Act states that this comprehensive
4 approach to protecting the Highlands Region includes the
5 identification of a preservation area “that would be subjected to
6 stringent water and natural resource protection standards,
7 policies, planning, and regulation,” and directs the DEP to
8 develop and enforce an environmental permitting program with
9 statutorily established standards in the preservation area of the
10 Highlands Region, and the act contains very specific standards to
11 be included in this permitting program; and

12 **WHEREAS**, With regard to septic system density, the Highlands Act
13 requires the DEP’s rules to include “a septic system density
14 standard established at a level to prevent the degradation of
15 water quality, or to require the restoration of water quality, and
16 to protect ecological uses from individual, secondary, and
17 cumulative impacts, in consideration of deep aquifer recharge
18 available for dilution”; and

19 **WHEREAS**, The DEP originally adopted septic system density
20 standards in May 2005, and subsequently readopted them in
21 2006, and the methodology used by the DEP to establish those
22 standards was found to be appropriate as part of a fact-finding
23 hearing conducted by the Office of Administrative Law in
24 response to a challenge brought by the New Jersey Farm Bureau;
25 and

26 **WHEREAS**, An Initial Decision by the Office of Administrative
27 Law, dated March 24, 2009, concluded that the originally
28 adopted septic system density standards set out in the DEP’s
29 rules were a valid exercise of the agency’s discretion, and this
30 finding, that the DEP acted properly in adopting its septic system
31 density standards, was adopted as a Final Decision on July 13,
32 2009; and

33 **WHEREAS**, The DEP’s May 2, 2016 rule proposal states that the
34 proposed standards “could result in up to 1,145 additional septic
35 systems, or about 12 percent more individual septic systems than
36 under the existing rule,” which would necessarily degrade water
37 quality in the Highlands Region; and

38 **WHEREAS**, Even properly operating and maintained septic systems
39 discharge nutrients, such as phosphates and nitrates, and some
40 bacteria or viruses to groundwater, and improperly sited or
41 maintained septic systems can discharge even more contaminants
42 to groundwater, resulting in contamination of groundwater and
43 surface water resources; and

44 **WHEREAS**, When nutrients such as phosphorus and nitrogen are
45 discharged from septic systems into the groundwater, they
46 contaminate drinking water supplies, and also represent a
47 potentially significant nonpoint source of pollution; and

1 **WHEREAS**, Septic systems may also contribute to the contamination
2 of groundwater by toxic chemicals; and the contaminants that
3 may enter groundwater through septic systems include heavy
4 metals and toxic chemicals from small commercial
5 establishments, ingredients in household products, and organic
6 chemicals typically found in septic tank cleaning products; and
7 **WHEREAS**, According to a 2015 report, “Potable Water Supplied in
8 2011 by New Jersey’s Highlands,” published by the New Jersey
9 Geological and Water Survey, in 2011 the Highlands Region
10 supplied 136 billion gallons of water or approximately one-third
11 of the total amount of potable water used in the State, and
12 Highlands water was distributed to 332 municipalities in 16
13 counties, home to 70 percent of the State’s population; and
14 **WHEREAS**, This is an increase from estimates in 1999 which
15 calculated that 107 billion gallons of the State’s potable water
16 came from the Highlands Region and was used in 292
17 municipalities, demonstrating that the Highlands Region serves
18 an increasingly important role in the State’s potable water supply
19 deserving of strong environmental protections; and
20 **WHEREAS**, The provisions of the Highlands Act, with regard to the
21 septic system density standards, have not changed since
22 enactment of the act, and there is no provision in the Highlands
23 Act directing the DEP to review and weaken its originally
24 adopted rules; and
25 **WHEREAS**, The new standards contained in the May 2, 2016 rule
26 proposal and subsequently adopted on April 21, 2017 and
27 published in the New Jersey Register on June 5, 2017 do not
28 comply with the requirement in the Highlands Act for the septic
29 system density standards to be established at a level to prevent
30 the degradation of water quality, or to require the restoration of
31 water quality, and to protect ecological uses; and
32 **WHEREAS**, In establishing both the original and new septic system
33 density standards, the DEP considered nitrate data obtained from
34 wells in the Highlands Region because nitrate is generally
35 considered an indicator for groundwater quality (i.e., a
36 “surrogate pollutant”); and
37 **WHEREAS**, However, for the new standards, the DEP relied in part on
38 nitrate data generated from wells sampled between 2004 and 2011,
39 after the date of enactment of the Highlands Act and, thus, the
40 proposed standards do not accurately preserve or maintain 2004
41 water quality conditions or restore water quality, as required by the
42 act, but instead reflect the development and accompanying
43 degradation in groundwater quality that has occurred since 2004
44 and allow water quality to continue to degrade; and
45 **WHEREAS**, The DEP’s rule proposal also directly contradicted the
46 language of the Highlands Act, by stating that the proposed rule
47 amendments seek to “relate the septic system density standards to
48 the . . . Highlands Regional Master Plan (RMP),” but section 34 of

1 the Highlands Act (C.13:20-32) requires, conversely, that the RMP
2 be based on the DEP's rules; and

3 **WHEREAS**, Assembly Concurrent Resolution No. 192 (1R) and Senate
4 Concurrent Resolution No. 148 (1R) declared that the proposal by
5 the DEP to revise the septic system density standards in the
6 Highlands Water Protection and Planning Act Rules, published for
7 public comment in the New Jersey Register on May 2, 2016, was
8 not consistent with legislative intent; and

9 **WHEREAS**, On June 8, 2017, Assembly Concurrent Resolution No.
10 192 (1R) received final approval by the Legislature and was filed
11 with the Secretary of State and transmitted to the Commissioner of
12 Environmental Protection; and

13 **WHEREAS**, Assembly Concurrent Resolution No. 192 (1R) informed
14 the DEP, pursuant to Article V, Section IV, paragraph 6 of the
15 Constitution of the State of New Jersey, that the department shall
16 have 30 days following transmittal of that concurrent resolution to
17 amend or withdraw the new rule or the Legislature may, by passage
18 of another concurrent resolution, exercise its authority under the
19 Constitution to invalidate the rule in whole or in part; and

20 **WHEREAS**, The DEP has failed to amend or withdraw, or provide any
21 notification to the Legislature of its intention to amend or withdraw,
22 the rule within 30 days after the transmission of Assembly
23 Concurrent Resolution No. 192 (1R); and

24 **WHEREAS**, Prior to voting on a concurrent resolution to invalidate an
25 adopted rule or regulation or prohibit the adoption of a proposed
26 rule or regulation, a public hearing shall be held on invalidating the
27 adopted rule or regulation or prohibiting the adoption of the
28 proposed rule or regulation, and the transcript of that hearing shall
29 be placed on the desk of each member of the Senate and each
30 member of the General Assembly; now, therefore,

31

32 **BE IT RESOLVED** *by the General Assembly of the State of New*
33 *Jersey (the Senate concurring):*

34

35 1. Pursuant to Article V, Section IV, paragraph 6 of the
36 Constitution of the State of New Jersey, the Legislature invalidates,
37 in whole, the rule adopted by the Department of Environmental
38 Protection on April 21, 2017 and published in the New Jersey
39 Register on June 5, 2017, which revised the septic system density
40 standards in the Highlands Water Protection and Planning Act
41 Rules.

42

43 2. Copies of this concurrent resolution, as filed with the
44 Secretary of State, shall be transmitted by the Clerk of the General
45 Assembly or the Secretary of the Senate to the Governor, the
46 Commissioner of Environmental Protection, and the Office of
47 Administrative Law.

1 3. This concurrent resolution shall take effect immediately.

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STATEMENT

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6 Pursuant to Article V, Section IV, paragraph 6 of the
7 Constitution of the State of New Jersey, this concurrent resolution
8 invalidates, in whole, the rule adopted by the Department of
9 Environmental Protection on April 21, 2017 and published in the
10 New Jersey Register on June 5, 2017, which revised the septic
11 system density standards in the Highlands Water Protection and
12 Planning Act Rules.

13 As required by the Constitution, the Legislature previously
14 informed the Department of Environmental Protection, through
15 Assembly Concurrent Resolution No. 192 (1R), of the Legislature's
16 finding that this rule is not consistent with legislative intent.